



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Water Policy Interim Committee

63rd Montana Legislature

SENATE MEMBERS

CHAS VINCENT—Chair
JENNIFER FIELDER
BRADLEY MAXON HAMLETT
SHARON STEWART-PEREGOY

HOUSE MEMBERS

KATHLEEN WILLIAMS—Vice Chair
PAT CONNELL
STEVE FITZPATRICK
REILLY NEILL

COMMITTEE STAFF

JASON MOHR, Lead Staff
HELEN THIGPEN, Staff Attorney
NADINE SPENCER, Secretary

Millie Heffner
Department of Natural Resources and Conservation
P.O. Box 201601
1424 Ninth Ave.
Helena, MT 59620

ENVIRONMENTAL QUALITY
COUNCIL. 2013-14

January 9, 2014

Exhibit 09

Jan. 7, 2014

Ms. Heffner,

As the legislative committee tasked with studying water policy in Montana, the Water Policy Interim Committee has debated water wells exempt from permitting since 2007. It is under this mandate and years of experience that the WPIC submits comments on the proposed rule to define the term "combined appropriation" as it applies to exempt wells. The motion to send this comment passed 6 to 2.

The majority of the committee's work during the 2011-2012 interim was devoted to this topic. Out of that interim came several recommendations and two bill drafts.

Those recommendations were:

- * It is reasonable to restrict the use of exempt wells in basins where new surface water uses are mostly limited and where hydrogeologic modeling concludes that surface waters would be depleted by an exempt well within a fairly short period of time that would be most likely to affect senior water right holders.
- * Restrictions on exempt wells in certain areas should be limited to areas where hydrogeologic data exists, including studies conducted by the Ground Water Investigation Program or other hydrogeologic studies.
- * The term "combined appropriation" should be defined by the Legislature. That definition should be appropriation from the same source aquifer of more than 35 gallons per minute and 10 acre-feet by two or more wells or developed springs that are physically connected into the same system.

The sentiments of these recommendations were incorporated into Senate Bills No. 19 and 346. Senate Bill No. 346 outlined the process to create stream depletion zones, areas where scientific modeling demonstrates ground water withdrawals effect surface water. Within these zones, water wells exempt from permitting are further limited.

Senate Bill No. 19 defined the term "combined appropriation" as referenced above. This definition essentially codifies the rule that has been in place since 1993. Senate Bill No. 19 passed the Senate and the House, but was vetoed by the governor.

The WPIC is concerned that the proposed rules are not consistent with the statute and ignores the intent of the 63rd Legislature and the history of the department's own rule making. Since 1987, the term "combined appropriation" has not been defined in statute. Yet the department has adopted two different definitions, proposed another last year, and is now proposing a fourth version.

How can four different definitions be consistent and reflect the intent of a term that has not changed in statute?

The new proposal, as well as the rule proposed last year, both ignore the intent of SB19 and fail to address the concerns of WPIC detailed earlier in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Chas Vincent".

Chas Vincent
Chairman, Water Policy Interim Committee



Secretary of State Linda McCulloch

SECRETARY OF STATE

HOME SEARCH ABOUT US CONTACT US HELP

Montana Administrative Register Notice 36-22-176

No. 24 12/26/2013

[Prev](#)[Next](#)BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
<u>36.12.101, 36.12.102, 36.12.103,</u>)	PROPOSED AMENDMENT AND
<u>36.12.115</u> and the adoption of New)	ADOPTION
Rules I and II regarding water right)	
combined appropriation)	

To: All Concerned Persons

1. On January 23, 2014, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Fred Buck Conference Room (bottom floor), Water Resources Building, 1424 Ninth Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than January 13, 2014, to advise us of the nature of the accommodation that you need. Please contact Millie Heffner, Montana Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620-1601; telephone (406) 444-0581; fax (406) 444-0533; e-mail mheffner@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

36.12.101 DEFINITIONS Unless the context requires otherwise, to aid in the implementation of the Montana Water Use Act and as used in these rules:

(1) through (12) remain the same.

(13) "Combined appropriation" means an appropriation of water as used under 85-2-306 (3)(a), MCA, from the same source aquifer (as defined in (58) below) by two or more groundwater developments, ~~that are physically manifold into the same system for 40 acres or less for or within:~~

(a) a subdivision as defined in 76-3-103, MCA, where the subdivision application is deemed to contain sufficient information for review by the governing body under 76-3-604(2), MCA, after [the effective date of these rules];

(b) land that is divided under 76-3-201(1)(a) and 76-3-207(1)(b) and (c), MCA, after [the effective date of these rules]; or

(c) a tract of record, as defined in 76-3-103, MCA, in existence on or before [the effective date of these rules]. A tract of record in existence on or before [the effective date of these rules] with 40 acres or less may have a combined appropriation up to 10 acre-feet per year under 85-2-306(3)(a)(iii), MCA; and

(d) if a subdivision under (a), land divided under (b), or a tract of record under (c) is in excess of 40 acres then the water user may have an additional combined appropriation for every 40 acres not to exceed a volume that is proportional to 40 acres or 0.25 acre feet per year for each acre under 85-2-306(3)(a)(iii), MCA.

(14) through (57) remain the same.

(58) "Same source aquifer" solely as related to "combined appropriation" as defined in (13) means:

(a) unconsolidated sediments throughout the state and underlying basin-fill sediments and/or sedimentary rocks in intermontane valleys, unless the applicant demonstrates that the aquifers are separate and not connected; or

(b) bedrock consisting of all consolidated geologic units not identified in (a) unless the applicant demonstrates that the individual geologic units are separate and not connected; and

(c) aquifers under (a) and (b) are not presumed to be connected into the same source aquifer.

(58) through (79) remain the same but are renumbered (59) through (80).

AUTH: 85-2-113, 85-2-306, MCA

IMP: 85-2-306, MCA

36.12.102 FORMS (1) The following necessary forms for implementation of the act and these rules are available from the Department of Natural Resources and Conservation, P.O. Box 201601, Helena, Montana 59620-1601 and its Water Resources regional offices, or on the World Wide Web at <http://dnrc.mt.gov/wrd/default.asp>. The department may revise as necessary the following forms to improve the administration of these rules and the applicable water laws:

(a) through (ah) remain the same.

(ai) Form No. 651, "Petition to Modify a Permit or Change Authorization"; and

(aj) Form No. 652, "Petition for Stream Depletion Zone-"; and

(ak) Form No. 653, "Pre-Approval for Notice of Completion."

AUTH: 85-2-113, 85-2-306, MCA

IMP: 85-2-306

36.12.103 FORM AND SPECIAL FEES

(1) remains the same.

(2) The department will assess the following filing fees:

(a) through (z) remain the same.

(aa) \$400 for Form No. 651, Petition to Modify a Permit or Change Authorization; and

(ab) \$750 for Form No. 652, Petition for Stream Depletion Zone-; and

(ac) \$50 for Form No. 653, Pre-Approval for Notice of Completion.

(3) through (4) remain the same

AUTH: 85-2-113, 85-2-306, MCA

IMP: 85-2-306, MCA

36.12.115 WATER USE STANDARDS

(1) remains the same.

(2) The department will use the following standards when reviewing notices or applications for new uses of water:

(a) for domestic use, for one household, 250 gallons per day up to 1.0 acre-foot per year of water for year-round use;

(b) through (6) remain the same.

AUTH: 85-2-113, MCA

IMP: 85-2-302, 85-2-306, MCA

4. The rules as proposed to be adopted provide as follows:

NEW RULE I NOTICE OF COMPLETION (1) A notice of completion is correct and complete pursuant to 85-2-306(3)(b) and (c), MCA, if:

(a) it limits the total combined appropriation to the requirements under ARM 36.12.101 (13) and is consistent with a pre-approval, if applicable; and

(b) it contains all the information on Form No. 602.

AUTH: 85-2-306, MCA

IMP: 85-2-306, MCA

NEW RULE II PRE-APPROVAL OF EXEMPT WELLS (1) An applicant may seek pre-approval from the department to determine if a combined appropriation is within the requirements of ARM 36.12.101(13).

(2) When making a determination on a pre-approval the department will use the following standards:

- (a) ARM 36.12.115;
- (b) Form No. 615; and
- (c) for types of water use that are not referenced in (a) and (b), the applicant must provide information to support the amount needed.

(3) The department shall make a determination on a pre-approval that a proposed plan for development is within the requirements of ARM 36.12.101(13) within 20 working days of submission of a correct and complete pre-approval application.

AUTH: 85-2-306, MCA

IMP: 85-2-306, MCA

REASONABLE NECESSITY: By order of the Montana First Judicial District Court, Lewis and Clark County, in *CFC et al. v. DNRC*, Cause No. BDV-2010-874, DNRC is required to define the term "combined appropriation" in 85-2-306, MCA, because no legislation was passed during the 2013 legislative session that defined the term. The amendments to ARM 36.12.101 and the adoption of New Rules I and II are reasonably necessary because the order requires that the definition be broader than, and not solely limited to: wells or developed springs that are physically manifold or connected together; and, that DNRC consider cumulative or collective impacts as a result of multiple, unconnected wells or developed springs that appropriate water from a single source aquifer and for a single project. DNRC had also previously found in its public declaratory ruling proceeding conducted pursuant to the Montana Administrative Procedure Act (2-4-308 and 2-4-501, MCA) *Declaratory Ruling, Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13)*, DNRC (2010), that the definition of "combined appropriation" needed to be amended for the reasons set forth in its ruling.

The amendments to ARM 36.12.101 are based on the 40-acre standard under 85-2-306, MCA, for exempt stock pits in order to create a consistent standard for future combined appropriations of exempt wells or developed springs for subdivisions, divisions of land, or wells that are located on the same tract of land. Additionally, DNRC believes the amended ARM 36.12.101(13) embodies and clarifies the single "project or development" concept of the "combined appropriation" definition promulgated by DNRC in 1987, contemporaneous to the addition of the term to statute in 85-2-306, MCA.

The amendments to ARM 36.12.101(58) are reasonably necessary to clarify the definition of "same source aquifer" and to identify which aquifers will be considered connected for the sole purpose of combined appropriations. This amendment is necessary because exempt wells do not go through the same site-specific analysis that other appropriations of water must go through before they are permitted to determine: what sources of water will be depleted; if water is legally available; and, if the new appropriation will have an adverse effect on other appropriators. The amendments to ARM 36.12.115 are based on the standards for water use provided by the Department of Environmental Quality (DEQ) for an average household in order to create a consistent standard for use between the two departments.

Pursuant to 85-2-113, MCA, DNRC may prescribe fees for public service provided under the Montana Water Use Act. DNRC evaluated processing costs for the new form to determine the fee amount for Form No. 653. The proposed fee is expected to generate \$25,000 per year and affect approximately 500 people.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Millie Heffner, Department of Natural Resources and Conservation, P.O. Box 201601, 1424 Ninth Avenue, Helena, MT 59620; fax (406) 444-0533; or e-mail mheffner@mt.gov, and must be received no later than 5:00 p.m. on January 23, 2014.

6. David Vogler, Department of Natural Resources and Conservation, has been designated to preside over and conduct the public hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Lucy Richards, P.O. Box 201601, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and adoption of the above-referenced rules will significantly and directly impact small businesses.

/s/ John E. Tubbs
JOHN E. TUBBS
Director
Natural Resources and Conservation

/s/ Candace F. West
Candace F. West
Rule Reviewer

Certified to the Secretary of State December 16, 2013.

[Home](#) | [Search](#) | [About Us](#) | [Contact Us](#) | [Help](#) | [Disclaimer](#) | [Privacy & Security](#)

For questions regarding the content, interpretation, or application of a specific rule, please contact the agency that issued the rule. A directory of state agencies is available online at <http://www.mt.gov/govt/agencylisting.asp>.

For questions about the organization of the ARM or this web site, contact sosarm@mt.gov.